

**Teamsters Local No. 592, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and Mountainside Transport, Inc./Somerset Driver Corp.<sup>1</sup> and Truck Drivers, Helpers, Taxicab Drivers, Garage Employees and Airport Employees Local No. 355, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Case 5-CD-294-1**

January 31, 1991

## DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

The charge in this Section 10(k) proceeding was filed January 9, 1990, by the Employer, alleging that the Respondent, Teamsters Local 592, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Teamsters Local 355. The hearing was held February 23, March 12, 27, and 28, and June 5 and 6, 1990, before Hearing Officer Stephen C. Bensinger. Thereafter, the parties filed briefs in support of their positions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

### I. JURISDICTION

The Employer, consisting of two New Jersey corporations, is engaged in the interstate and intrastate transportation of goods, freight, and commodities at its facilities in Baltimore, Maryland, and Richmond, Virginia. During the year preceding the hearing, a representative period, the Employer received gross revenues in excess of \$50,000 from its interstate operations. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Teamsters Local 592 and Teamsters Local 355 are labor organizations within the meaning of Section 2(5) of the Act.

## II. THE DISPUTE

### A. Background and Facts of Dispute

The Employer has a contractual arrangement with A&P supermarkets for transportation and delivery of merchandise by truck to the stores in A&P's Richmond Division in the State of Virginia. The Richmond Division has three subdivisions, or districts: the Richmond district, comprising stores in the Richmond metropolitan area; the Valley district, consisting of stores in or near the Shenandoah Valley area; and the Tidewater district, made up of stores in Virginia's Tidewater region. The Employer has collective-bargaining relationships with both Local 355 and Local 592, with collective-bargaining agreements in effect during the period of the work dispute up to the time of the hearing. The Employer's drivers represented by Local 355 originate from the Employer's Baltimore, Maryland terminal, and its drivers represented by Local 592 originate from the Employer's Richmond terminal. The material transported and delivered by the Employer for the A&P consists of three general categories: "perishables" (meat, dairy products, and produce); bakery products; and "groceries," which, for purposes of this decision, may be described as those products sold at A&P stores that are neither bakery products nor perishables. The work at issue in this proceeding, as formally set forth below, involves only the delivery of groceries to the A&P stores in the three districts of the Richmond Division.

In January 1984, A&P made the Employer its contract carrier for the Richmond Division stores. The Employer established its terminal in Richmond and used Local 592 drivers for the delivery of, inter alia, groceries to all the stores in the Division. The drivers hauled the groceries from A&P's grocery warehouse in Richmond. This arrangement continued through the end of 1987. In January 1988, A&P closed its Richmond grocery warehouse and contracted with the Richfood Company for delivery of groceries to all the stores in the Richmond Division. Richfood, a nonunion operator, hauled the groceries from its own warehouse in Richmond. Thus, when the Richfood contract went into effect, the Employer's Local 592 drivers ceased delivery of groceries to the A&P stores in the division, although their delivery of other products to the stores continued.

In early 1989,<sup>2</sup> A&P decided to terminate its contract with Richfood, and to supply its Richmond Division stores with groceries from its grocery warehousing facility in Baltimore. The plan was for a gradual phasing-out of Richfood's grocery deliveries to the Richmond Division stores, with a simultaneous phasing-in of the Employer's delivery of groceries originating from the Baltimore A&P warehouse. In

<sup>1</sup> At the hearing, the parties stipulated that Mountainside Transport, Inc. and Somerset Driver Corp. constitute a single employer for purposes of this proceeding. Both will be referred to here as the Employer.

<sup>2</sup> All subsequent dates are in 1989 unless otherwise noted.

February the Employer began discussions with Local 355 concerning compensation for the role that the Employer's drivers based at its Baltimore terminal and represented by Local 355 would play in the new arrangement.

In early April the changeover from Richfood to the Employer began; it continued until approximately mid-June. The exact nature of the changeover, and the Employer's methods of delivery in each of the Division's three districts, is explained below. As for the districts overall, it is apparent that at the beginning, the Employer's Local 355 drivers hauled the groceries from the Baltimore warehouse and delivered them directly to the A&P stores first becoming available as the coverage of the Richfood contract receded. In May, partly as a result of complaints from Local 592 concerning Local 355 drivers' participation in the delivery work and partly as a result of concerns for efficient performance of the work, the Employer began to assign some of the work to its Richmond-based Local 592 drivers. The Local 592 drivers' role took the form of a final delivery, or "pedal," to certain A&P stores from the Employer's Richmond terminal, following a "shuttle" of the groceries from Baltimore to the Richmond terminal by the Employer's Local 355 drivers. By August, the Employer's overall plan for delivery of groceries to the stores in all three districts of the Richmond Division was fully in place. The plan involved an amalgamation of direct deliveries by Local 355 drivers to certain stores of groceries originating from the Baltimore warehouse, and a "shuttle/pedal" delivery method for other stores, with Local 355 drivers "shuttling" the groceries from Baltimore to the Richmond terminal, and Local 592 drivers thereupon "pedaling" the groceries from the terminal to the stores.

More specifically, in the Valley district of the Richmond Division, Richfood's service ceased in early April and the Employer's Local 355 drivers began direct delivery of groceries from Baltimore to all stores. This delivery method was still in place at the time of the hearing. With respect to the Tidewater district of the Richmond Division, in mid-May Local 355 drivers began shuttling groceries to the Richmond terminal for two stores in the district; from there Local 592 drivers pedaled the groceries to the stores. Richfood delivered groceries to the other 25 stores in the district. In the next few weeks the number of stores receiving groceries by means of the Employer's shuttle/pedal method increased dramatically as Richfood's service was phased out. By mid-June, Local 355 drivers were shuttling and Local 592 drivers were pedaling the groceries to all the stores in the Tidewater district, and this delivery pattern continued at the time of the hearing.

Concerning the Richmond district of the Richmond Division, in late April, the Employer's Local 355 drivers began direct delivery of groceries to 14 of the dis-

trict's stores, with Richfood servicing the remaining two stores. In mid-May, Local 355 drivers began direct delivery to all 16 stores. In early June, the Employer shifted to a shuttle/pedal method for all the stores, thus involving Local 592 drivers. In mid-June, the Employer again adjusted the delivery method, allocating 60 percent of the grocery loads to the shuttle/pedal mode and 40 percent of the loads to direct delivery by Local 355 drivers. This adjustment remained in place until August when the Employer decided on the delivery method for the Richmond district stores that continued at the time of the hearing: 90 percent of the deliveries accomplished by the shuttle/pedal method, and 10 percent, representing the "overflow" work that the Employer's Local 592 drivers were unable to pedal, completed by Local 355 drivers' direct delivery to the stores.

On December 20, representatives of the Employer and Local 592 met to discuss negotiations for a new collective-bargaining agreement. Local 592's president, Ronald Jenkins, claiming knowledge that the Employer was negotiating with Local 355 for transfer of A&P grocery delivery work in the Richmond Division then being done by Local 592 drivers, threatened a strike against the Employer should this work be given to Local 355 drivers. In a letter to the Employer dated January 11, 1990, Jenkins made essentially the same threat.

#### *B. Work in Dispute*

The disputed work involves the delivery of grocery products to the supermarkets in A&P's Richmond Division.

#### *C. Contentions of the Parties*

The Employer contends that neither local's drivers should be granted the exclusive right to make the delivery of groceries to the Richmond Division stores. Rather, the Employer contends that it should be permitted to retain the flexibility to use either Local 592 drivers, by means of pedal deliveries from the Richmond terminal, or Local 355 drivers, by means of direct deliveries from A&P's Baltimore warehouse, to deliver groceries to the Richmond Division stores, depending on its evaluation of the most economical and efficient delivery method at any given time. The Employer claims that its preference is supported by the factors of economy and efficiency and by its practice thus far concerning grocery deliveries in the Richmond Division, and its practice concerning similar work in the Richmond Division and elsewhere. Also, noting that its assignments thus far have not resulted in job losses affecting the membership of either local, the Employer contends that the factor of job impact favors the determination it urges.

Local 592 contends that the drivers it represents should exclusively be awarded the work in light of its role in the delivery of grocery products in the Richmond Division prior to 1988, and because its collective-bargaining agreement with the Employer covers the disputed work. Alternatively, Local 592 agrees with the Employer that the work should be awarded to either local's drivers as economy and efficiency dictate.

Local 355 argues that the employees it represents should be awarded the work exclusively because it secured a contractual right to perform the work in negotiations with the Employer in 1989, and it contends that both the Employer's practice and the area practice support such an award.

#### D. Applicability of the Statute

On December 20, Local 592's president threatened a strike against the Employer if the delivery work being done by Local 592 drivers in the Richmond Division were reassigned to Local 355 drivers, and he essentially repeated this threat in a letter to the Employer dated January 11, 1990. In light of this conduct, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. In addition, although each of the parties is engaged in at least one of several bilateral proceedings seeking resolution of this work dispute, it is apparent on this record that there is no agreed method binding *all* the parties for a voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

#### E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

##### 1. Collective-bargaining agreements<sup>3</sup>

As noted above, both locals have current collective-bargaining agreements with the Employer. Although Local 592 claims that the disputed work is covered by its contract with the Employer, it admits, and we agree, that nothing in that agreement specifically ad-

resses a right to deliver grocery products to the stores in A&P's Richmond Division.<sup>4</sup>

Similarly, there is nothing in Local 355's collective-bargaining agreement with the Employer that specifically covers a right to deliver grocery products to the Richmond Division stores. However, Local 355 contends that in negotiations with the Employer in February and April it secured the exclusive right to deliver groceries to all the stores in the Richmond Division.

The record establishes that when it became apparent that A&P would terminate its contract with Richfood and have groceries destined for its Richmond Division stores originate from its Baltimore grocery warehouse, the Employer understood that its Baltimore terminal and its Local 355 drivers would have a role in the transportation of the groceries. Pursuant to reopener provisions in the parties' collective-bargaining agreement pertaining to compensation for new work, in February the Employer submitted four written proposals to Local 355 concerning: a limited extension of the agreement's duration to cover the new work, the basic payrate for the work, the payrate when a certain mileage figure was exceeded, and the pay rate for the most senior drivers.

It is apparent that the parties had several discussions concerning these proposals between February and early April. Local 355 submitted written counterproposals and, ultimately, the parties reached agreement on three of the four matters, but apparently did not resolve disagreements stemming from the Employer's proposal for payment of the most senior drivers. In any event, what is most significant is the lack of evidence that the negotiating parties specifically discussed the work at issue in this proceeding, i.e., whether Local 355 drivers would be afforded the right to make delivery of the groceries to the Richmond Division stores, rather than merely shuttling the groceries to the Employer's Richmond terminal. On this record it is apparent that this issue simply did not come up in negotiations.

In light of the above, we find the evidence relating to the factor of collective-bargaining agreements inconclusive, and thus this factor does not favor an exclusive award of the disputed work to drivers represented by either local.

##### 2. Employer preference and past practice

The Employer's preference is for retention of the flexibility to use both locals' drivers for delivery of groceries to the division stores rather than for an exclusive award to either group of drivers. In addition to

<sup>3</sup>There is no record evidence concerning any Board certifications relevant to the determination of this dispute.

<sup>4</sup>Local 592 also contends that the Company's practice under the collective-bargaining agreement prior to 1988 was to assign the A&P grocery delivery work to its Local 592 drivers. We note that the closing of A&P's Richmond groceries warehouse and the Richfood delivery service contract in 1988 terminated that practice, and that the disputed delivery work, in which the groceries originate in Baltimore rather than Richmond, is significantly different from the delivery work Local 592 drivers performed prior to 1988.

the economy-and-efficiency factor, discussed below, the Employer contends that its preference is supported by its practice thus far with respect to the specific work in question, and by its past practice concerning similar work.

We note that the Employer's delivery of groceries to the A&P stores in the Richmond Division is "new work," in the sense that the groceries now originate from A&P's Baltimore warehouse. The Employer's practice regarding the work is of short duration, the record establishing that the Employer's system of delivering the groceries within the entire division did not fully settle into place until August, about 6 months before the hearing in this proceeding began. Nevertheless, the available evidence of its practice tends to support the Employer's preference for flexibility of assignment, in view of the different modes of delivery in the division's three districts, each apparently tailor-made to the circumstances.

Thus, since the work started to become available with the phaseout of the Richfood service, the Employer has used its Local 355 drivers for direct delivery of groceries to the Valley district stores, rather than the shuttle/pedal method using Local 592 drivers in addition to the Local 355 drivers. At the same time, for grocery deliveries to the Tidewater district stores, the Company has employed only the shuttle/pedal method, with Local 592 drivers making the ultimate delivery to the stores. In the Richmond district, after what the Employer views as an experimental period between April and August during which each delivery mode was used for a time, the Employer has settled on a pattern in which deliveries are accomplished predominantly by the shuttle/pedal method. However, even in the current situation Local 355 drivers make direct deliveries to the Richmond district stores of the "overflow" work which can not be handled with the Richmond terminal's manpower—about 10 percent of the total grocery deliveries in the district.

The Employer's past practice with regard to similar delivery work also tends to support its preference for assignment of the work at issue.<sup>5</sup> Since at least 1984, the Employer has delivered A&P's bakery products, which originate from its Baltimore bakery, to the stores in the Richmond Division by means of both direct delivery by the Local 355 drivers and shuttle/pedal involving both driver groups, each method depending on the circumstances. And, outside the Richmond Division, the Employer's Local 355 drivers initially made direct deliveries of bakery products to the stores in A&P's Philadelphia Division. Then, after the Employer opened a terminal in Florence, New Jersey, near Phila-

delphia, it used Local 355 drivers to shuttle the products to the terminal and used drivers from another Teamsters local for the pedal to the stores.

We find that the factors of employer preference and practice do not favor an exclusive award of the work in dispute to the drivers represented by either local. Rather, these factors favor an award permitting the Employer the flexibility to assign the work to both driver groups.

#### . Area and industry practice

The record evidence concerning area and industry practice is scant and unclear. For example, there was testimony that the industry practice requires that drivers of the local having a working relationship with a supermarket chain's warehouse deliver the warehouse's products to the stores, but, assuming that this is accurate, it is unclear whether such a practice is applicable when the geographic area served by the warehouse has expanded substantially or is as extensive as in the case here. There was also testimony that, at one time, products transported from Safeway Stores' warehouse in Landover, Maryland, to the Richmond area were shuttled by one Teamsters local to an intermediate point, and then pedaled to the Richmond area Safeway Stores by Local 592 drivers. However, it is apparent that currently these products are delivered to the stores directly from the warehouse.

We find that the evidence relating to the factor of area and industry practice is inconclusive, and that this factor does not favor an award of the disputed work to either group of drivers.

#### 4. Economy and efficiency of operations

With respect to the factor of economy and efficiency, testimony at the hearing focused extensively on the delivery of groceries in the Richmond district of the Richmond Division. Following the "experimental period" between April and August, during which the direct delivery and shuttle/pedal methods were used both exclusively and in combination, the Employer concluded that shuttle/pedal delivery was the more economical and efficient mode for these stores, and its delivery assignments since August have reflected this determination.

The record establishes sufficiently that direct deliveries by Local 355 drivers to the Richmond district stores cost 100 additional overtime hours per week in comparison with shuttle/pedal deliveries using both Local 355 and Local 592 drivers. The additional overtime cost resulted from a combination of overtime pay for Local 355 drivers and the additional time involved in their delivering to the individual stores rather than merely dropping the grocery loads at the Employer's Richmond terminal and returning to Baltimore.

Further, the record establishes that direct delivery by Local 355 drivers to the Richmond district stores in-

<sup>5</sup>When new work is in dispute, and accordingly there is limited evidence of the employer's practice concerning the work, the Board has considered the company's practice regarding similar work in making its determination. See, e.g., *Plumbers Local 189 (Davis-McKee)*, 254 NLRB 1222, 1225 (1981).

creases the likelihood of layovers in light of Department of Transportation (DOT) restrictions on hours driven during each 24-hour period. Layover costs involve both contractual allowance payments to the Local 355 drivers laying over, and the unavailability of both driver and equipment during the layover period. Finally, it is apparent that the delivery service to the stores is more effective under the shuttle/pedal mode because of the relatively short distances between the Richmond terminal and the Richmond district stores and because of the Local 592 drivers' familiarity with the immediate geographic area and with A&P store personnel.

The Employer contends that its delivery assignments to the Tidewater district stores on a shuttle/pedal basis and its delivery assignments to the Valley district stores on a direct-delivery basis are both the most economical and efficient methods of carrying out the disputed work in those districts. Neither local has challenged this position in any significant way, and thus there is little evidence in the record on this issue. The record does indicate that because of the distance between Baltimore and the Tidewater stores, layover restrictions and costs, discussed above, would be even more of a problem if the delivery work in the Tidewater district were assigned to Local 355 drivers on a direct-delivery basis. Conversely, regarding the Valley district, documentary evidence in the record indicates that because Baltimore is closer to most of that district's stores than it is to Richmond, shuttle/pedal deliveries through the Employer's Richmond terminal to these stores would be impractical.

In light of the above, we find that the factor of economy and efficiency of operations does not favor an exclusive award to either local's drivers, but tends to favor permitting the Employer the flexibility of work assignments it prefers.

#### 5. Relative skills

There is a dearth of evidence concerning this factor. It is apparent that there is no significant difference between the skills of Local 592 drivers and those of Local 355 drivers to perform the disputed work. It is further apparent that this factor does not favor an exclusive award of the work to either local's drivers.

#### 6. Job impact<sup>6</sup>

Evidence was submitted indicating that an exclusive award of the disputed work to Local 355 drivers would require an immediate layoff of one-third of the Employer's Local 592 drivers, and conceivably could result in the Employer's shutting down its Richmond ter-

minal.<sup>7</sup> In addition the record establishes that the Employer's practice thus far in assigning the work in the Richmond Division to both groups has not resulted in job loss for either driver group. Accordingly, the Employer, with Local 592 concurring, contends that this factor favors an award of the work to both locals' drivers pursuant to the Employer's preference for flexibility of work assignment.

Although the Employer's assignment of the delivery work has not resulted in negative job impact up to this time, we find the evidence insufficient to assess this factor appropriately in light of the relatively short period of the Company's practice of assigning the work. Thus, the disputed delivery work only began to be available for assignment in April and, taking account of the gradual phaseout of the Richfood service and the "experimental period" in the Richmond district, the Employer's current practice did not fully fall into place until August, about 6 months before the hearing began. Compare, e.g., *Teamsters Local 639 (United Rigging)*, 296 NLRB 803 (1989), in which the Board, in making its determination, relied in part on the absence of any job loss resulting from the employer's practice of 6 years' standing of assigning the disputed work to both employee groups.

Because we find the evidence relating to the job impact factor inconclusive, this factor does not favor an award pursuant to any party's assertions.

#### Conclusions

After considering all the relevant factors we conclude that none of the factors favors an exclusive award of the grocery delivery work in the Richmond Division to Local 355 drivers or to Local 592 drivers, both of whom have been assigned the work thus far. In these circumstances, we conclude that the Employer has the right to assign the work, in accordance with its practice regarding this and similar work, to drivers represented by either local, depending on the circumstances involved. See, e.g., *United Rigging*, supra; *Graphic Communications Local 670 (Reynolds Metals)*, 289 NLRB 947 (1988); *Machinists Lodge 70 (General Electric)*, 233 NLRB 356 (1977). We reach this conclusion relying on the factors of employer preference and practice, and economy and efficiency of operations.<sup>8</sup> In making this determination, we are awarding the work to employees represented by either local, not to the locals or their members. This determination is limited to the controversy that gave rise to this proceeding.

<sup>6</sup>Member Cracraft does not rely on this factor in reaching the determination of which group of employees should be assigned the work in dispute. See *Carpenters (Mistick & Sons)*, 293 NLRB 1224 fn. 6 (1989).

<sup>7</sup>No evidence was received concerning the job impact on Local 355 drivers should Local 592 drivers be awarded the delivery work exclusively.

<sup>8</sup>Also, we note Local 592's support for this choice of award in its alternative contentions.

## DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Mountainside Transport Inc./Somerset Driver Corp. who are represented by Truck Drivers, Helpers, Taxicab Drivers, Garage Employees and Airport Employees Local No. 355, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, and employees of the Employer who are represented by Teamsters Local No. 592, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, are entitled to perform the delivery of grocery products to the supermarkets in A&P's Richmond Di-

vision, involving the Employer's facilities in Baltimore, Maryland, and Richmond, Virginia.

2. Teamsters Local No. 592, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Mountainside Transport Inc./Somerset Driver Corp. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Teamsters Local No. 592, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO shall notify the Regional Director for Region 5 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.